

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MARIA VALDOVINES,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security  
Administration,

Defendant.

No. CV-11-5020-RHW

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court are cross-Motions for Summary Judgment, ECF Nos. 13, 16. David L. Lybbert represents Plaintiff Maria Valdovines. Special Assistant United States Attorney Stephanie Kiley represents the Defendant Commissioner of Social Security. Plaintiff brings this action seeking judicial review of the final decision of the Secretary denying her application for benefits under Title II of the Social Security Act. After reviewing the administrative record and briefs filed by the parties, the Court is fully informed. For the reasons set forth below, the Court **grants** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings per 42 U.S.C. § 405(g).

**I. Jurisdiction**

On September 7, 2006, Plaintiff filed an application for Disability Insurance Benefits ("DIB"). Tr. 130, 159. Plaintiff alleged disability beginning on January 1, 2001, due to back pain and depression. Tr. 163. After benefits were denied initially

**ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 1**

1 and on reconsideration, Plaintiff requested a hearing before an administrative law  
 2 judge (“ALJ”). Tr. 9. A hearing was held on June 15, 2009. Tr. 33-49. Plaintiff  
 3 appeared with counsel and testified by video. *Id.* Gary Jeske, a Vocational Expert  
 4 (“VE”) testified, while ALJ Richard Say presided over the hearing. *Id.*

5 In a decision dated June 24, 2009, The ALJ denied Plaintiff DIB benefits,  
 6 finding she was not disabled under the Act. Tr. 97-104. Thereafter, the Appeals  
 7 Council denied Plaintiff’s request for review, which made the ALJ’s decision the  
 8 Commissioner’s final decision. Tr. 1-4. Thus, the Court has jurisdiction pursuant to  
 9 42 U.S.C. § 405(g).

## 10 II. Sequential Evaluation Process

11 The Social Security Act defines disability as the “inability to engage in any  
 12 substantial gainful activity by reason of any medically determinable physical or  
 13 mental impairment which can be expected to result in death or which has lasted or  
 14 can be expected to last for a continuous period of not less than twelve months.” 42  
 15 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be  
 16 under a disability only if his impairments are of such severity that the claimant is  
 17 not only unable to do his previous work, but cannot, considering claimant's age,  
 18 education and work experiences, engage in any other substantial gainful work  
 19 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

20 The Commissioner has established a five-step sequential evaluation process  
 21 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),  
 22 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

23 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
 24 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and  
 25 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,  
 26 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is  
 27

28 **ORDER GRANTING PL.’S MOTION FOR SUMMARY JUDGMENT AND  
 DENYING DEF.’S MOTION FOR SUMMARY JUDGMENT \* 2**

1 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,  
2 416.920(b). If he is not, the ALJ proceeds to step two.

3 Step 2: Does the claimant have a medically-severe impairment or  
4 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
5 claimant does not have a severe impairment or combination of impairments, the  
6 disability claim is denied. A severe impairment is one that lasted or must be  
7 expected to last for at least 12 months and must be proven through objective  
8 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is  
9 severe, the evaluation proceeds to the third step.

10 Step 3: Does the claimant's impairment meet or equal one of the listed  
11 impairments acknowledged by the Commissioner to be so severe as to preclude  
12 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.  
13 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed  
14 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the  
15 impairment is not one conclusively presumed to be disabling, the evaluation  
16 proceeds to the fourth step.

17 Step 4: Does the impairment prevent the claimant from performing work he  
18 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant  
19 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot  
20 perform this work, proceed to the fifth and final step.

21 Step 5: Is the claimant able to perform other work in the national economy  
22 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),  
23 416.920(f).

24 The initial burden of proof rests upon the claimant to establish a prima facie  
25 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098 (9th  
26 Cir. 1999). This burden is met once a claimant establishes that a physical or mental  
27 impairment prevents him from engaging in his previous occupation. *Id.* At step

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 3**

1 five, the burden shifts to the Commissioner to show that the claimant can perform  
2 other substantial gainful activity. *Id.*

### 3 **III. Standard of Review**

4 The Commissioner's determination will be set aside only when the ALJ's  
5 findings are based on legal error or not supported by substantial evidence in the  
6 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing  
7 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."  
9 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial  
10 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
11 to support a conclusion." *Perales*, 402 U.S. at 401. The Court must uphold the  
12 ALJ's denial of benefits if the evidence is susceptible to more than one rational  
13 interpretation, one of which supports the decision of the administrative law judge.  
14 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). "If the evidence can  
15 support either outcome, the court may not substitute its judgment for that of the  
16 ALJ." *Matney*, 981 F.2d at 1019.

17 A decision supported by substantial evidence will be set aside if the proper  
18 legal standards were not applied in weighing the evidence and making the decision.  
19 *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir.  
20 1988). An ALJ is allowed "inconsequential" errors as long as they are immaterial  
21 to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec. Admin.*,  
22 454 F.3d 1050, 1055 (9th Cir. 2006).

### 23 **IV. Statement of Facts**

24 The facts of the case are set forth in detail in the transcript of proceedings,  
25 and only briefly summarized here. Plaintiff was born in 1956. Tr. 130. She alleged  
26 disability at age 44, and was age 52 on the date of the hearing. *Id.* Plaintiff attended  
27 school through at least the fourth grade in Mexico, and is unable to speak or read

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 4**

1 English. Tr. 46. Plaintiff lives in Pasco, Washington, and worked as a laborer. Tr.  
2 164. Her job title was agricultural sorter and involved lifting and carrying items  
3 and boxes of product. *Id.* On June 22, 1999, Plaintiff injured her back while  
4 working as a product inspector at J.R. Simplot. Tr. 253, 254, 275. Plaintiff reported  
5 that while assembling boxes, she bent over, and, after standing up experienced  
6 severe pain in her lower back. Tr. 360. Plaintiff eventually returned to her job  
7 performing less strenuous work, but was laid-off in December of 1999.

8 As a result of her injury, Plaintiff was diagnosed with lumbosacral strain,  
9 although a later MRI found preexisting and unrelated mild degenerative disk  
10 disease. Tr. 364. Plaintiff was treated with chiropractic care, physical therapy, and  
11 seen for mental health issues. Tr. 353. On December 6, 2001, Andrew Whitmont,  
12 Ph.D., diagnosed Plaintiff with pain disorder associated with both psychological  
13 factors and a general medical condition. Tr. 289. Plaintiff was assessed a GAF  
14 score of 55, indicating moderate impairment. Tr. 290.

15 On March 28, 2002, Thomas Dillon, M.D., prepared a report at the request  
16 of Plaintiff's attorney. Tr. 336-42. He diagnosed Plaintiff with depression NOS and  
17 pain disorder associated with both psychological factors and a general medical  
18 condition. Tr. 341. Dr. Dillon assessed Plaintiff a GAF score of 55-60. Drs. Dillon  
19 and Whitmont both opined that the depression and the pain disorder were related to  
20 Plaintiff's industrial accident that occurred on June 22, 1999. Dr. Dillon continued  
21 to treat Plaintiff from October 8, 2002 to July 28, 2006. Tr. 470-506. Plaintiff was  
22 also treated for anxiety and depression by her family physician Alex Najera, M.D.,  
23 from February of 2004 through November of 2006. Tr. 483, 548-54. Dr. Najera  
24 prescribed Plaintiff Xanax and then Effexor. *Id.*

25 Plaintiff also had four independent medical evaluations related to her  
26 worker's compensation claim spanning from the date of her injury through July 16,  
27

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 5**

1 2002, which included physical and psychiatric examinations. Tr. 252-63, 264-70,  
2 271-79, and 352-70.

### 3 **V. The ALJ's Finding**

4 At step one, the ALJ found that Plaintiff had not engaged in substantial  
5 gainful activity from her alleged onset date of January 1, 2001, through her date of  
6 last insured on March 31, 2005. Tr. 27.

7 At step two, the ALJ found that Plaintiff's degenerative disc disease of the  
8 lumbar spine was a "severe" impairment. *Id.* (citing 20 C.F.R. § 404.1520(c)).  
9 However, the ALJ found that Plaintiff's medically determinable somatoform  
10 disorder was not severe, as it did not cause more than minimal limitations in  
11 Plaintiff's ability to perform basic mental work activities. Tr. 27-28.

12 At step three, the ALJ found that Plaintiff's impairment did not meet or  
13 equal a listed impairment, as her degenerative disc disease was not of sufficient  
14 severity to meet or equal a listed impairment. Tr. 29.

15 At step four, the ALJ determined that Plaintiff had the residual functional  
16 capacity ("RFC") to perform light work as defined by 20 C.F.R. § 404.1567(b),  
17 except she was limited to occasional stooping, crouching, and crawling and could  
18 not climb ladders, ropes, or scaffolds. Tr. 29. The ALJ also found that Plaintiff was  
19 unable to drive and could not work around concentrated exposure to vibration. *Id.*  
20 As such, Plaintiff was capable of performing her past relevant work as an  
21 agricultural sorter and she was not disabled under the Act. Tr. 31. Thus, her  
22 application for benefits was denied. Tr. 32.

### 23 **VI. Issues for Review**

24 The issues before the Court are whether the final decision of the  
25 Commissioner was supported by substantial evidence, and whether the correct  
26 legal standard was applied in reaching this decision. Plaintiff alleges the ALJ erred  
27 at steps two and four of the sequential evaluation. Specifically, she contends the

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 6**

1 ALJ committed the following errors: (1) disregarded her mental limitations, and  
2 found them to be non-severe; (2) dismissed opinions by treating chiropractors; (3)  
3 failed to make a proper credibility finding, and (4) failed to properly assess her  
4 residual functional limitations. Defendant maintains that substantial evidence of  
5 the record supports the ALJ's decision and it is free of legal error.

## 6 VII. Discussion

7 Plaintiff argues the ALJ improperly evaluated her mental impairments. ECF  
8 No. 14 at 13. Plaintiff contends that while the ALJ recognized her somatoform  
9 disorder, he erred in finding that it did not cause more than minimal limitation and  
10 was not severe. Tr. 27. Specifically, she argues the ALJ failed to address her  
11 diagnosis of depression at step two, and did not consider any medical evidence  
12 beyond 2002. Tr. 12-14. Plaintiff also asserts the ALJ did not properly consider the  
13 opinions of Thomas Dillon, M.D., Plaintiff's treating psychiatrist. Dr. Dillon  
14 diagnosed Plaintiff with depression on March 28, 2002. Tr. 336. Plaintiff also  
15 submitted Dr. Dillon's additional Physician's Statement dated June 23, 2009,  
16 which was not considered by the ALJ in his written decision, or by the Appeals  
17 Council. ECF No. 18-3 at 2-5. Plaintiff further argues the ALJ ignored the opinions  
18 of her treating chiropractors. ECF No. 14 at 13. Plaintiff also challenges the ALJ's  
19 credibility determinations.

20 Defendant responds that any error by the ALJ was harmless. Defendant  
21 argues that because the ALJ found at least one severe impairment, and continued  
22 through the sequential evaluation, there is no reversible error. ECF No. 17 at 8.  
23 Defendant submits the ALJ gave specific and legitimate reasons for discounting  
24 Dr. Dillon's 2002 opinions. Defendant also argues that Dr. Dillon's June 2009  
25 opinion should be disregarded as untimely, as Plaintiff has not met the good cause  
26 requirement. *Id.* at 10. Defendant asserts that the ALJ properly considered the  
27

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 7**



1 opinions of Plaintiff's chiropractors, reasonably assessed her credibility, and that  
2 substantial evidence supported the ALJ's RFC finding. *Id.* at 15-18.

3 **A. Step Two Findings – Severe Impairments**

4 At step two of the sequential evaluation, the ALJ determines whether a  
5 claimant suffers from a “severe” impairment, i.e., one that significantly limits his  
6 physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c),  
7 416.920(c). To satisfy step two's requirement of a severe impairment, the claimant  
8 must prove the existence of a physical or mental impairment by providing medical  
9 evidence consisting of signs, symptoms, and laboratory findings. The fact that a  
10 medically determinable condition exists does not automatically mean the  
11 symptoms are “severe,” or “disabling” as defined by the Social Security  
12 regulations. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1157–58 (9th Cir.  
13 2001). Once medical evidence of an underlying impairment has been shown,  
14 medical findings are not required to support the alleged severity of pain. *Bunnell v.*  
15 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).

16 The Commissioner has passed regulations which guide dismissal of claims  
17 at step two. Those regulations state that an impairment may be found to be not  
18 severe only when evidence establishes a “slight abnormality” on an individual's  
19 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (citing Social  
20 Security Ruling (“SSR”) 85-28). The step two inquiry is best characterized as a *de*  
21 *minimis* screening device to dispose of groundless or frivolous claims. *Bowen v.*  
22 *Yuckert*, 482 U.S. 137, 153-154 (1987). A mental impairment generally is  
23 considered non-severe for purposes of step two if the degree of limitation in the  
24 three functional areas of activities of daily living, social functioning, and  
25 concentration, persistence or pace is rated as “none” or “mild” and there have been  
26 no episodes of decompensation. 20 C.F.R. §§ 404.1520a (d)(1), 416. 920a (d)(1).

27 Objective medical evidence alone is evaluated in assessing severity. *Webb v.*

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 8**



1 *Barnhart*, 433 F.3d 683 (9th Cir. 2005). “The severity requirement cannot be  
 2 satisfied when medical evidence shows that the person has the ability to perform  
 3 basic work activities, as required in most jobs.” *Id.*

4 Even if an impairment is considered non-severe, in determining a claimant's  
 5 residual functional capacity, the ALJ must consider the limiting effects of all of the  
 6 claimant's impairments. 20 C.F.R. § 416.945(e); SSR 96–8P.

### 7 **1. The ALJ’s Evaluation of Plaintiff’s Mental Health Impairments**

8 Here, the ALJ recognized only Plaintiff’s somatoform disorder and found  
 9 that it did not cause more than minimal limitation in her ability to perform basic  
 10 mental work activities; thus, it was not severe. Tr. 27. In reaching this conclusion,  
 11 the ALJ gave the March 2002 opinion of Plaintiff’s treating psychiatrist Dr. Dillon  
 12 little weight. Tr. 28. As the ALJ noted in his findings, Dr. Dillon diagnosed  
 13 Plaintiff with depression and pain disorder and assessed her a GAF score of 55-  
 14 60<sup>1</sup>. *Id.* Dr. Dillon also “opined that [Plaintiff] had marked deficiencies of  
 15 concentration, persistence or pace and that she had experience[d] three episodes of  
 16 decompensation of at least two weeks of duration. *Id.* The ALJ went on to  
 17 erroneously state that Plaintiff “did not require any mental health treatment through  
 18 her date of last insured” which he determined to be March 31, 2005. Tr. 27-28.

19 Instead, the ALJ relied on the April 16, 2002, psychological evaluation  
 20 prepared by examining psychologist Philip G. Barnard, Ph.D. Tr. 28. Dr. Barnard  
 21 opined there was no significant evidence of a mental disorder. Tr. 347-51. The  
 22 Plaintiff was assessed a GAF score of 80. Tr. 351. Dr. Barnard disagreed with Drs.

---

25 <sup>1</sup> “A GAF score is a rough estimate of an individual’s psychological, social, and  
 26 occupational functioning used to reflect the individual’s need for treatment.”  
 27 *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998).

1 Dillon and Whitmont's<sup>2</sup> opinion that Plaintiff's mental disorder was causally  
2 related to her workplace injury. *Id.*

3 In further rejecting Dr. Dillon's opinion, the ALJ cited another psychiatric  
4 evaluation completed as part of an independent medical evaluation conducted on  
5 July 16, 2002. Tr. 366. This report was part of an additional evaluation related to  
6 Plaintiff's worker's compensation claim. *Id.* Psychiatrist David Bot, M.D.,  
7 examined Plaintiff and authored the mental health portion of the report. *Id.* Dr. Bot  
8 diagnosed Plaintiff with pain disorder and probable embellishment of  
9 symptomatology consistent with partial malingering. Tr. 369. He assessed her a  
10 GAF score of 70-71 (mild to expectable symptoms). However, Dr. Bot also opined  
11 that Plaintiff's paid disorder was "causally related to her industrial injury" and  
12 recommended continued psychiatric therapy. *Id.* The ALJ then evaluated Plaintiff's  
13 "paragraph B" Criteria and found only mild limitation in the first three categories,  
14 and no episodes of decompensation in the fourth. Tr. 28; *See* 20 C.F.R. Part 404,  
15 Subpt. P, App. 1. § 12.00 Mental Disorders (discussing paragraph B criteria and  
16 assessment of severity of mental health disorders).

17 In reaching his opinion regarding the severity of Plaintiff's mental health  
18 impairments, the Court finds that the ALJ erred. The ALJ has a duty to consider  
19 the entire record, and failed do so in this case regarding Plaintiff's depression and  
20 pain disorder. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir.1993) (finding the  
21 ALJ erred by ignoring substantial evidence on the overall record"). The ALJ's  
22 duty, even if a claimant is represented by counsel, is to "scrupulously and  
23 conscientiously probe into, inquire of, and explore for all relevant facts" and be  
24 "especially diligent in ensuring that favorable as well as unfavorable facts and  
25 circumstances are elicited." *Vidal v. Harris*, 637 F.2d 711, 713 (9th Cir.1981).

26 <sup>2</sup> Dr. Whitmont (cited incorrectly by the ALJ as "Whitman") examined Plaintiff in  
27 November of 2001 and initially diagnosed her with pain disorder. Tr. 285-90.

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 10**

1 Therefore, the ALJ's statement that Plaintiff did not require any mental  
2 health treatment through her date of last insured, ignores substantial evidence in  
3 the record supporting the severity of her pain disorder and depression. Tr. 28.  
4 Similarly, while acknowledging the depression and anxiety treated by Dr. Najera,  
5 the ALJ stated "there is no evidence of further complaints of mental symptoms  
6 until August of 2006. These conclusions were not supported by substantial  
7 evidence in the record.

8 A cursory examination of the record reveals that Plaintiff was seen by Dr.  
9 Dillon from 2002-2006, and treated for both depression and pain disorder. As  
10 revealed by Dr. Dillon's notes, Plaintiff continuously sought treatment from  
11 October 8, 2002, beyond her date of last insured in March of 2005, and into 2006.  
12 Tr. 470-506. In fact, on March 2, 2005, Dr. Dillon wrote that "because of  
13 significant residual symptoms" he felt that a Category 2 permanent partial mental  
14 health impairment was appropriate. Tr. 490. In addition, Plaintiff sought treatment  
15 from her family physician Alex Najera, M.D., from February of 2004 through  
16 November of 2006. Tr. 483, 548-54. Plaintiff alleged disability beginning on  
17 January 1, 2001, yet the ALJ failed to address any evidence supporting the severity  
18 of Plaintiff's mental health impairments beyond July of 2002.

19 The instant record reflects that Plaintiff's mental impairments could prevent  
20 a person from engaging in unskilled labor. Tr. 470-506; *see also* SSR 85-28 at \*2  
21 (suggesting "the severity regulation is to do no more than allow the Secretary to  
22 deny benefits summarily to those applicants with impairments of a minimal nature  
23 which could never prevent a person from working") (internal citation omitted). The  
24 ALJ's basis for finding Plaintiff's mental impairments not severe at step two is not  
25 supported by the record. Accordingly, the Court concludes that the ALJ erred when  
26 he found Plaintiff's pain disorder and depression not severe.

27  
28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 11**

**2. Dr. Dillon's 2009 Physician's Statement**

Plaintiff seeks to submit for consideration the supplemental Physician's Statement of Dr. Dillon, dated June 19, 2009, ECF No. 14-1. The ALJ conducted a hearing in this matter on June 15, 2009. Tr. 33. During the hearing, Plaintiff's representative specifically asked that the record be left open to accommodate Dr. Dillon's statement regarding her mental health limitations. Tr. 48. On June 23, 2009, Plaintiff's representative submitted Dr. Dillon's statement to the Office of Disability Adjudication and Review. *See* Lybbert Aff., ECF No. 18-1; Ex. 3, ECF No. 18-3. The ALJ's written decision was dated June 24, 2009. Tr. 25. Therefore, neither the ALJ, nor the Appeals Council reviewed Dr. Dillon's statement. Tr. 1-5, 25-32. In addition, although submitted only one day before the ALJ's written decision, the record reveals that Plaintiff sought such information in May of 2009, well before the date of the actual hearing. Ex. 2, ECF No. 18-2.

Defendant argues that Plaintiff has failed to request remand pursuant to "sentence six" of 42 U.S.C. § 405(g), or shown good cause for the delay in producing such information. ECF No. 17 at 35-37. "Sentence six" of § 405(g) provides that the Court may order additional evidence to be considered upon remand where new, material evidence is adduced, that was for good cause not presented before the agency. *See Shalala v. Schaefer*, 509 U.S. 292, 297 n.2 (1993). The Court is persuaded that such evidence is material and Plaintiff has met her burden in establishing good cause.

Dr. Dillon opined that Plaintiff's overall physical and mental condition would have precluded her from employment due to absenteeism and flare-ups of symptoms during the treatment period of 2002–2006. ECF No. 14-1. As Defendant correctly points out, Dr. Dillon's opinion that Plaintiff is "unable to work" is not a medical opinion, but is a vocational opinion reserved to the Commissioner. 20 C.F.R. § 404.1527(e). However, the Court disagrees that Dr. Dillon's opinion

**ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 12**

1 would not be entitled to any special significance. As stated above, it would be  
2 entitled to controlling weight in the severity analysis and should have been  
3 considered by the ALJ, as Dr. Dillon treated Plaintiff for depression and pain  
4 disorder for over four years. *See Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1985)  
5 (stating the standards for rejection of a treating doctor's opinion). Furthermore, as  
6 the transcript of the hearing revealed, Plaintiff's mental health impairments, in  
7 combination with her physical impairments, were not addressed in the evaluation  
8 of her RFC. Tr. 47-48. Thus, upon remand, the ALJ is to consider the Physician's  
9 Statement of Dr. Dillon dated June 19, 2009, ECF No. 14-1.

### 10 **3. Harmless Error**

11 Defendant argues that the ALJ's multiple step two errors should not be cause  
12 for reversal because a severe impairment was found and the sequential evaluation  
13 continued. ECF No. 17 at 8.

14 An error may be considered harmless where the error "occurred during an  
15 unnecessary exercise or procedure;" is non-prejudicial to the Plaintiff; is  
16 considered irrelevant to the determination of non-disability; or if the reviewing  
17 court can "confidently conclude" that no reasonable ALJ could have reached a  
18 different disability determination if erroneously disregarded testimony was  
19 credited. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

20 In this case, the exclusion of the somatoform disorder and depression from  
21 the step two findings resulted in prejudice to Plaintiff because symptoms and non-  
22 exertional limitations caused by these impairments were not considered throughout  
23 the sequential evaluation process. Specifically, Plaintiff's mental state was not  
24 adequately evaluated regarding her mental limitations caused by depression and  
25 pain disorder. These limitations were neither discussed nor considered in  
26 combination with Plaintiff's physical impairments. *See SSR 85-28 at \*3* (noting the  
27

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 13**

1 ALJ's duty to consider "the possibility of several such impairments combining to  
2 produce a severe impairment").

3 These omissions necessarily prejudiced Plaintiff at step four because neither  
4 the RFC assessment nor the vocational expert testimony contemplated non-  
5 exertional limitations caused by these two medically established impairments.  
6 *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir.1988); *DeLorme v. Sullivan*, 924  
7 F.2d 841, 850 (9th Cir.1990) (failure to include all limitations in hypothetical  
8 renders VE testimony unsupported by substantial evidence).

9 This court cannot conclude that an ALJ, once these errors are corrected, will  
10 find Plaintiff not disabled. Hence, the errors are not harmless and remand is  
11 required. *See Stout*, 454 F.3d at 1056.

#### 12 **B. Step Four Findings Regarding Physical Limitations**

13 Additionally, the Plaintiff asserts that the ALJ erred in rejecting the opinions  
14 of Plaintiff's chiropractors and in the assessment of her credibility and RFC  
15 determinations regarding her physical limitations. ECF No. 14 at 15-21.

16 First, even assuming the reports of Drs. Kenneth Peterson, D.C., Gregory  
17 Oberg, D.C., and Luis M. Nicacio, D.C., were improperly rejected, the Court  
18 agrees that their assessments involve vocational issues, which are the province of  
19 the ALJ because an ultimate finding of disability is reserved for the Commissioner.  
20 *See* 20 C.F.R. § 404.1527(e). Likewise, the final RFC determination is the  
21 responsibility solely of the ALJ, and is based on medical and vocational factors in  
22 the entire record, as well as the ALJ's credibility determination. Because further  
23 proceedings will require the evaluation of additional evidence and a re-evaluation  
24 of the entire record, including Plaintiff's credibility, these assertions need not be  
25 addressed at this time.

26 ///

27 ///

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 14**

1 **C. Remand**

2 Where an ALJ's determination is not supported by substantial evidence or is  
3 tainted by legal error, the Court may remand a case for additional proceedings or  
4 an immediate award of benefits. Remand for additional proceedings is proper  
5 where (1) outstanding issues must be resolved, and (2) it is not clear from the  
6 record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379  
7 F.3d 587, 593 (9th Cir. 2004). Here, enhancement of the record is necessary to  
8 resolve outstanding issues (at steps 2, 4, and possibly 5) that must be resolved  
9 before a determination of disability can be made. The Court cannot make findings  
10 regarding Plaintiff's mental impairments or limitations caused by somatoform  
11 disorder or depression in combination with her degenerative disc disease. Further,  
12 additional vocational expert testimony will be required at step four and possibly  
13 step five to determine if there is work Plaintiff can perform with limitations  
14 supported by the record.

15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment, ECF No. 13 is **GRANTED**.  
17 This matter is remanded to the Commissioner for additional proceedings pursuant  
18 to 42 U.S.C. § 405(g), for consideration of Plaintiff's mental health impairments  
19 and re-evaluation of the evidence as directed above.

20 2. Defendant's Motion for Summary Judgment, ECF No. 16 is **DENIED**.

21 3. Application for attorney's fees may be filed by separate motion.

22 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
23 Order and forward copies to counsel. Judgment shall be entered for Plaintiff, and  
24 the file shall be **CLOSED**.

25 **DATED** this 7<sup>th</sup> day of February, 2013.

26 *s/Robert H. Whaley*  
27 ROBERT H. WHALEY  
28 Senior United States District Judge

**ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT \* 15**